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NO. 80 -

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS,
Petitioners,

v.

LAWRENCE A. SARAUW,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petition For Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Under the 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 905(b), is a vessel owner under a duty to provide constant supervision to insure that equipment (a gangway) owned, furnished, installed, maintained and monitored by an independent stevedoring contractor remains safe for use by a longshoreman employee of the stevedoring contractor?

2. Where a vessel owner's duty of care under 33 U.S.C. § 905(b) is premised on control of equipment which it does not own or install, must not a breach of that duty be proved by facts establishing control rather than expert opinion of a vessel owner's traditional and non-delegable duty to exercise control?

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The opinion of the United States Court of Appeals for the Third Circuit from which review is sought is not officially reported but is set forth in the Appendix. (App. 1a). The opinion of the District Court of the Virgin Islands is not officially reported but is set forth in the Appendix. (App. 17a).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Third Circuit dated and entered on May 20, 1980.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this

> subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Respondent Sarauw brought this lawsuit against Petitioners, Oceanic Navigation Corporation (hereinafter "Oceanic") and VLCC[1] ANDROS ATLAS in the District Court of the Virgin Islands, Division of St. Croix. Sarauw claimed damages from Oceanic as a result of personal injuries he sustained on November 15, 1977, when a gangway furnished by his employer, Hess Oil Virgin Islands Corporation (hereinafter "Hess"), for ingress to and egress from Oceanic's tanker, the ANDROS ATLAS, fell while he was ascending it. Sarauw's claim against

[1]VLCC is an abbreviation for Very Large Crude Carrier.

Oceanic is governed by 33 U.S.C. § 905(b) which requires that he establish Oceanic's negligence in order to recover. Jurisdiction in the District Court of the Virgin Islands was pursuant to 48 U.S.C. § 1612.

The ANDROS ATLAS arrived alongside the Hess Terminal's No. 3 dock at St. Croix, U.S. Virgin Islands, at 7:20 p.m. on November 14, 1977, to discharge a full cargo of crude oil. Because of the manner in which the dock was constructed, Hess required the ANDROS ATLAS, and all other tankers discharging at its St. Croix terminal, to use gangways owned and supplied by Hess. The limited dock space, encumbered by discharge hoses and booms, made it virtually impossible for vessels to deploy their own gangways. After berthing of the

ANDROS ATLAS by Hess pilots and tugs, Hess dock employees placed into position and secured to the vessel Hess' short, lower gangway which rested on the dock itself. The placement was accomplished by Hess employees using a crane located on the dock tower, which supported and provided access to the long, upper gangway also owned by Hess.[2] The securing of the shipboard end of the lower gangway was done with chains and ropes owned and supplied by Hess. After the placement and securing of the lower gangway, Hess employees, including Sarauw (who was a dock helper), monitored it to determine the point in the discharge of crude oil

[2] The lower gangway, dock tower and underside of the upper gangway are shown on a photograph identified as Plaintiff's Exhibit No. 6 at trial which is reproduced in the Appendix. (App. 46a). In this Exhibit, the lower gangway is to the right of the tower and the underside of the upper gangway is shown at the top right hand section of the tower. To utilize the upper gangway, one has to ascend the stairs on the tower.

when the lower gangway was no longer safe due to the sharp angle created as the ANDROS ATLAS rose in the water. At this juncture, the upper gangway, secured to a platform on the tower, was to be extended over the vessel and made fast to the vessel.

Sarauw was at the No. 3 dock at 11:00 p.m. on November 14, 1977 and, until his accident shortly after 2:30 a.m. on November 15, 1977, was the only Hess employee at the dock. In the course of monitoring the lower gangway and otherwise performing his job for Hess, Sarauw used the lower gangway to board the ANDROS ATLAS on two separate occasions prior to his accident to advise the vessel to stop, and later to resume, discharge of oil. These orders from ashore were recorded in the vessel's log at 12:25 a.m. and 1:35 a.m. At about 2:30 a.m., Sarauw made the determination

that the lower gangway had to be replaced with the upper gangway on the tower. After moving the upper gangway over the vessel's side with the crane, Sarauw noticed the vessel's chain railings in place where he wanted to position the gangway, and when no crewmember responded to his call, he went down to the dock and started up the lower gangway to remove the vessel's railing. As he ascended the lower gangway, it fell from the vessel's side because the chains and ropes securing it had been removed. Sarauw denied that he had removed them and stated that when he had previously used the gangway to board the vessel, he had not noticed if they were in place. There was uncontradicted evidence that the gangway was originally secured and also that the Master of the ANDROS ATLAS saw it secured when he used it during the night. There was no evidence as to who removed the

chains and ropes or when they were removed.

The case was submitted to the jury pursuant to the District Court's instructions that Oceanic's duty to Sarauw was that set forth in §§ 343 and 343A of the Restatement (Second) of Torts. The jury found that Oceanic's negligence proximately caused Sarauw's accident. Additionally, the jury found that Sarauw's own negligence and the negligence of Hess were proximate causes of the accident to the extent of 25 percent each. The District Court entered judgment in Sarauw's favor for the amount of the jury verdict reduced by the 50 percent negligence attributable to Sarauw and Hess. Both Sarauw's and Oceanic's post-trial motions were denied by the District Court.

On appeal pursuant to 28 U.S.C. § 1291, the United States Court of

Appeals for the Third Circuit observed that Edmonds v. Compagnie Generale Transatlantique, 99 S.Ct. 2753 (1979) and Griffith v. Wheeling- Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3374 (U.S. Nov. 23, 1979) (No. 79-813) were decided subsequent to the trial and the District Court's opinion and order denying all post-trial motions. In light of Edmonds, the judgment of the District Court was vacated with instructions that a new judgment be entered in the amount of the jury verdict reduced only by the percentage of negligence attributable to Sarauw. In all other respects the District Court's judgment was affirmed.

In holding that the District Court properly denied Oceanic's post trial motions, the Third Circuit relied on Griffith, and De Los Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979), cert. granted, 100 S.Ct.

2150 (1980) (No. 79-512) as defining the vessel owner's duty of care owed to a longshoreman employed by an independent stevedoring contractor. It is the determination of that duty of care and its application to the instant facts which Petitioners request this Court to review.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE A SERIOUS SPLIT OF AUTHORITY EXISTS IN THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO THE PROPER DUTY OF CARE OWED BY A VESSEL OWNER TO A LONGSHOREMAN UNDER THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

In holding that Oceanic had breached a negligence duty to Sarauw under 33 U.S.C. § 905(b), the Court of Appeals for the Third Circuit stated:

> The standard by which Oceanic is to be judged is of "reason-

> able care under the circumstances," which "would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger."

Sarauw v. Oceanic Navigation Corp., _____ F.2d _____ (App. 8a) (3d Cir. 1980), citing Griffith v. Wheeling-Pittsburg Steel Corp., 610 F.2d at 126.

There is a serious split of authority in the courts of appeals as to whether the above quoted language properly enunicates a vessel owner's duty of care under § 905(b). This formulation of the duty was first announced in De Los Santos. The Seventh Circuit effectively adopted the same duty of care in

Matthews v. Ernst Russ Steamship Co., 603 F.2d 676, 680 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3274 (U.S. Oct. 15, 1979) (No. 79-624). The Third Circuit first adopted it in Griffith, and reaffirmed it in the instant case. Likewise, The First Circuit has embraced this duty of care in Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980), petition for cert. filed, 48 U.S.L.W. 3679 (U.S. April 10, 1980) (No. 79-1587).

The duty of care "fashioned" in De Los Santos is in conflict with the Congressional directive that the courts uniformly apply land based principles of law controlling the relationship between property owners and independent contractors provided they do not incorporate the abolished maritime law theories of "unseaworthiness" and "non-delegable duty." Hurst v. Triad Shipping Co., 554 F.2d

1237, 1246-53 (3d Cir.), cert. denied, 434 U.S. 861 (1977).

Three other courts of appeals (the Second, Fourth and Fifth Circuits) have remained faithful to this Congressional mandate and have formulated the duty of care by reference to the applicable land based analogues. Chavis v. Finnlines, Ltd. O/Y, 576 F.2d 1072 (4th Cir. 1978). Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), rehearing denied, 610 F.2d 818 (1980), petition for cert. filed, 48 U.S.L.W. 3538 (U.S. Feb. 8, 1980) (No. 79-1240). Giglio v. Farrell Lines, Inc., 613 F.2d 429 (2d Cir. 1980).

On May 12, 1980, this Court granted certiorari in De Los Santos. Further, petitions for writs of certiorari addressing the question of what duty a vessel owner owes a longshoreman under 33 U.S.C. § 905(b) are pending in

the following cases in addition to those referred to above. Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3323 (U.S. Nov. 1, 1979) (No. 79-706). Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3242 (U.S. Oct. 1, 1979) (No. 79-538) Irizarry v. Compania Maritime Navegacion Netumar, S.A., No. 79-7876 (2d Cir., filed April 22, 1980), petition for cert. filed, 48 U.S.L.W. 3031 (U.S. July 21, 1980) (No. 80-94).

This Court has not previously addressed the questions raised in this Petition. Because of the conflict in the courts of appeals on these important questions, review by this Court of the judgment of the Court of Appeals for the Third Circuit should be granted.

II. THE JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT WAS BASED ON AN ERRONEOUS DUTY OF CARE FIRST ARTICULATED IN DE LOS SANTOS V. SCINDIA STEAM NAVIGATION CO., 598 F.2d 480 (9th CIR. 1979), CERT. GRANTED, 100 S. CT. 2150 (1980) (NO. 79-512) AND FOLLOWED IN GRIFFITH V. WHEELING-PITTSBURGH STEEL CORP., 610 F.2d 116 (3d CIR. 1979), PETITION FOR CERT. FILED, 48 U.S.L.W. 3374 (U.S. Nov. 23, 1979) (No.79-813).

A. THE DUTY OF CARE ADOPTED BY THE THIRD CIRCUIT IS GROUNDED ON THE PRE-AMENDMENTS CONCEPT OF A NON-DELEGABLE DUTY.

Sarauw's jury verdict was reviewed by the Third Circuit in the context of a perceived duty of vessel owners to know or by the exercise of reasonable care to discover conditions on board ship that could cause injuries to longshoremen. (App. 8a). Included within this perceived duty is the conclusion that a vessel owner must furnish watchmen for continuous inspection of a gangway owned,

furnished, installed and monitored by an independent stevedoring contractor to insure the safety of the very longshoremen whose job it is to install and monitor the gangway. Indeed, immediately prior to his accident, the plaintiff here had inspected Hess' lower gangway and determined that it was no longer safe for use due to the rising of the ANDROS ATLAS in the water. Unfortunately, Sarauw performed his duties carelessly because he did not determine that the lower gangway also was unsafe in that it was no longer secured to the vessel by the ropes and chains furnished and put into place by Hess. The jury determined that Sarauw was negligent.

Hess' complete assumption of responsibility for the deployment and safety of its gangways was established by the testimony of its terminal manager,

Hoo, and its safety manager Piwonka.

Hoo testified as follows:

Q Can you tell us who had the initial responsibility in November of 1977 for gangways?

A It was and still is Hess' responsibility to connect gangways.

Q [W]ho would do the connecting and who would be responsible and how [would it] be done?

A The Dock Foreman has responsibility for all activities on the docks including connections of gangways on the individual vessels, the A mechanic would be assigned the responsibility of overseeing the connections.

....

Q Was there any responsibility imposed upon the Dock Foreman as relates to gangways once they are installed? ... Was there any continuing duty imposed upon him? ... I am referring to during the remainder of the ship's time.

A That these features be maintained.

Q Was this a specific job requirement at that time?

A It was, yes.

[Trial transcript at 442-43, 451].

Piwonka testified as follows:

Q [W]ho is responsible for securing the gangways at the refinery?

A [T]he instructions are to our terminal people when they place a gangway into place, they must assure it is tied off, or secure.

....

Q By whom are the Hess gangways attached to the ship?

A The Hess dock employees are responsible to put the gangway in place and to assure that it is secured.

....

Q [W]ho has the responsibility for placing the Hess gangplanks and securing them and seeing to their safety both during the time they are placed and subsequent thereto?

A Our dock employees are responsible for placing the

gangway in position and they are responsible to assure that they are properly tied to the ship.

Q And this responsibility continues until a vessel is disengaged from the dock. Isn't that correct?

A Yes.

[Trial Transcript 113, 127, 136].

In totally ignoring the uncontroverted evidence of Hess' actual control over and responsibility for its gangways, the Third Circuit found opinion evidence of custom sufficient to establish the control necessary to support a duty of care by Oceanic. In effect, the Third Circuit permitted a former ship's officer, one Captain James, to establish the duty of care with his opinion that vessel owners customarily furnish gangway watchmen. Having adopted this "expert" -created duty of care, the Third Circuit concluded that Sarauw's accident was

caused by Oceanic's breach of the duty in failing to have a "gangway watch...[who] could have alerted Sarauw [to] the dangerous condition". (App. 9a). Yet, Sarauw was the very person who had the responsibility to monitor the gangway.

Prior to the 1972 enactment of 33 U.S.C. § 905(b) it was undisputed that vessel owners owed to longshoremen an absolute and non-delegable duty to provide them a safe place to work. This pre- § 905(b) duty was included in the negligence cause of action available to longshoremen. Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 211-12 (1963). Similarly, it is beyond doubt that Congress intended to abolish the vessel owner's absolute and non-delegable duty obligating owners to furnish longshoremen with a safe place to work, as well as any other species of liability

without fault, when it enacted § 905(b). E.g., Hurst v. Triad Shipping Co., 554 F.2d 1237, 1247 (3d Cir. 1977), cert. denied, 434 U.S. 861 (1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 507 (2d Cir. 1976); Bess v. Agromar Line, 518 F.2d 738, 740-41 (4th Cir. 1975). As the Third Circuit noted in Hurst, Congress intended for the courts to "analyze the standard of care under section 905(b) afresh". 554 F.2d at 1246.

The Third Circuit's abdication to an expert of its responsibility to establish the duty of care owed by a vessel owner to longshoremen under § 905(b) is particularly egregious in light of Captain James' testimony of the "custom" for vessel owners to furnish a gangway watchman. His opinions simply reflected the pre- § 905(b) absolute and

non-delegable duty to provide longshoremen with a safe place to work. This is clearly evident from Captain James' testimony:

Q Now, you said that you had served on other vessels where the gangways have been provided by the shore people. Is that correct?

A Yes, that is correct.

Q What effect does that have upon the duties of the deck officers and the crew?

A As far as securing of the gangway to the ship, it makes no difference who supplies the gangway, it is the duty of the ship to secure the head of the gangway. There is no way you can transfer that responsibility .... regardless of whose gangway it is, it is the ship's responsibility to secure it.

Q [Y]ou indicated, I believe, that the ultimate responsibility for the gangplank rests upon the ship. Is that correct?

A Yes.

Q Would you say that this is a duty that you could not delegate?

A Yes, sir.

[Trial Transcript 193-94, 241].

Further, Captain James acknowledged that there was no United States Coast Guard regulation requiring a vessel owner to post a gangway watchman. In effect, therefore, the Third Circuit has grafted onto § 905(b) an absolute and non-delegable duty on vessel owners with respect to stevedores' gangways in clear contravention of Congressional intent.

The Third Circuit favorably cited Reyes v. Marine Enterprises, Inc., 494 F.2d 866 (1st Cir. 1974) to support its imposition of a duty of care on Oceanic. (App. 6a) In so doing it is obvious that the Third Circuit did not heed its own admonition in Hurst to "analyze the standard of care under section 905(b) afresh". 554 F.2d at 1246. Reyes involved an accident that

occurred before the effective date of § 905(b) and was decided pursuant to expansive maritime principles of negligence that were abolished by § 905(b). Factually, Reyes is quite similar to the instant case:

> The gangway from which [the plaintiff longshoreman] fell was owned and controlled by a concern we shall call Molinos. It did not belong to the barge or its owner. Suspended from a tower on pilings next to the dock, it could be raised or lowered by cables attached to the tower. The [district] court concluded that the injury was caused by "pierside equipment attached to the pier based structure and not part of the ship or its appurtenances and that there was no member of the crew of the ship directing the plaintiff nor having any control over the plaintiff or his activities at the time." ... The apparatus from which plaintiff fell was the regular means of boarding and leaving the vessel.

484 F.2d at 869.

The First Circuit reversed a directed verdict in the vessel owner's favor because it found the gangway was a piece of equipment encompassed by the warranty of seaworthiness. "The duty... extends to the gangway by whomever supplied, owned or controlled." Id. at 869.

With "perhaps less certainty," id. at 870, the First Circuit also decided that a negligence action could be maintained under the absolute and non-delegable duty owed by the vessel owner in pre- § 905(b) cases. Id. The First Circuit explicitly declined to render an advisory opinion whether the same result would obtain under 33 U.S.C. § 905(b). 494 F.2d at 870 n.4. The Third Circuit has made that judgment in the instant case, effectively holding that the old law of non-delegable duty still applies.

B. THE DUTY OF CARE ADOPTED BY THE THIRD CIRCUIT IS IN CONFLICT WITH ITS PRIOR HOLDING IN HURST V. TRIAD SHIPPING CO., 554 F.2d 1237 (3d Cir.), CERT. DENIED, 434 U.S. 861 (1977).

Apart from the conflict existing among the various courts of appeals on the duty of care issue under 33 U.S.C. § 905(b),[3] the Third Circuit's opinion in the case under consideration and its earlier opinion in Hurst are in conflict. Factually, the only difference between the two cases is that Hurst involved a crane and the instant case a gangway. In both cases the equipment was owned, supplied and controlled by the stevedore. In both cases the injured longshoremen introduced expert testimony on the issue of vessel owner liability.

[3] Discussed supra at pp.10-14.

In Hurst it was noted that "plaintiffs introduced testimony that it is the custom in the maritime industry for ship officers to be assigned to observe discharge operations at the various hatches ... [to] make sure that the stevedore operates properly...." 554 F.2d at 1241. Expert testimony was also introduced to establish "that a reasonably prudent chief officer would stop a discharge operation if he observed an unsafe hook [on a crane owned and supplied by the stevedore]." Id. The Third Circuit held this evidence insufficient to impose a duty on the vessel owner premised on control of the crane under § 414 of the Restatement (Second) of Torts which, along with § 409, were adopted as a part of the federal common law applicable to longshoremen suits

against vessel owners under the 1972 amendments. "Indeed, the general rule [of § 409] applied that the vessel owner owes no duty to protect or to warn the stevedoring company or its employees against dangerous conditions in their equipment...." 554 F.2d at 1252.

In both Hurst and the case under review, the only evidence of control was opinion testimony of "customary" vessel undertakings. In contrast to Hurst, the Third Circuit found evidence of custom in the instant case sufficient to support a finding that the vessel owner retained control over the equipment in question. It did not explain how evidence of custom in Hurst failed to establish that degree of control necessary to support a duty of care under § 414 while similar evidence of custom in the instant

case did.[4] There can be no reconciliation of the two cases.

Review of the Third Circuit's judgment by this Court is appropriate. If resort to "custom" and prior precedents establishing absolute and non-delegable duties is permitted, it is clear that liability will be imposed on vessel owners in many cases where they have no means whatsoever to exercise control and prevent harm. See Bradshaw v. THE CAROL ANN, 163 F. Supp. 366 (S.D. Tex. 1956). Moreover, the rationale of the Third Circuit opinion is susceptible of application to many other situations where 33 U.S.C. § 905(b) applies. This is particularly true in the shipbuilding and ship

[4] When the vessel owner's trial counsel asked Hess' safety manager whether the vessel retained any control over the gangway, the District Judge sustained plaintiff's counsel's objection. The Master and Second Officer testified that the crew did not participate in the work of placing or securing the Hess gangway.

repair industries, where employees of independent contractors routinely come aboard ship to install, repair, test and operate equipment "customarily" operated and controlled by the ship's crew. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412-413 (1953). Lusich v. Bloomfield Steamship Co., 355 F.2d 770, 772-74 (5th Cir. 1966). Where the vessel has surrendered control to an independent contractor fully capable of supervising its own employees in the performance of assumed vessel functions, liability should not attach. See Smith v. Eastern Seaboard Pile Driving, Inc., 604 F.2d 789, 796 (2d Cir. 1979).

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request

that this Court issue a Writ of Certiorari to review the judgment of the Third Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2076 and 79-2077

LAWRENCE A. SARAUW
Appellant in No. 79-2077

v.

OCEANIC NAVIGATION CORPORATION
and VLCC ANDREAS ATLAS.

Oceanic Navigation Corporation
and VLCC Andros Atlas.
Cross-Appellants in No. 79-2076

ON APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS

C. A. No. 78-0057

Argued April 22. 1980

Before: ADAMS. MARIS and SLOVITER. *Circuit Judges*

(Filed May 20. 1980)

ROBERT B. WHITE. JR. (Argued)
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JOSEPH L. COSTELLO (Argued)
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U. S. Virgin Islands
Attorney in No. 79-2077

OPINION OF THE COURT

ADAMS, *Circuit Judge*

Lawrence A. Sarauw, an employee of Hess Oil Virgin Islands Corporation (Hess), commenced this action in the District Court of the Virgin Islands against Oceanic Navigation Corporation (Oceanic), the owner of the vessel VLCC ANDROS ATLAS, pursuant to §18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (1972 Amendments), 33 U.S.C. §905(b).[1] Sarauw sought damages for injuries sustained on November 15, 1977, allegedly as a result of the negligence of Oceanic and Hess, when the gangway to the ANDROS ATLAS fell while he was ascending it.

Following a four day trial, the case was submitted to the jury on special interrogatories. In answering these interrogatories the jury found (1) that Oceanic was negligent and its negligence was the proximate cause of Sarauw's injuries; (2) that Sarauw himself was negligent and was 25% at fault; (3) that Hess, the stevedore-employer, was negligent and its percentage of fault was 25%; and (4) that Sarauw's total damages were $190,800.00.[2] Judgment was entered for Sarauw, but

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1. That section provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

2. These damages were also submitted on special interrogatories, and the jury found as follows:

$ 7,000.00	Medical Expenses
8,800.00	Lost Income — Past
- 0 -	Lost Income — Future
100,000.00	Pain and Suffering
25,000.00	Loss of Enjoyment of Life
50,000.00	Permanent Disability/Disfigurement
$190,800.00	Total Damages

the court reduced the damage calculation by 25% for Sarauw's negligence,[3] and by another 25% for the negligence of Hess.

Both parties appealed. Sarauw claims that the 25% reduction because of the negligence of Hess is error. Oceanic contends that it was error to deny its post-trial motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Oceanic asserts in support of its appeal from the denial of its motion for judgment n.o.v. that no duty of care was owed by it to Sarauw to provide a safe gangway and that, even assuming such a duty, there was insufficient evidence to establish a breach of that duty. In support of the appeal from the denial of the new trial motion, Oceanic contends that the trial court incorrectly instructed the jury on the duty of care, and that the listing of pain and suffering, disfigurement, and loss of life's pleasures as separate components of damages in the special interrogatories was plain error.

We reject each of Oceanic's contentions and, accordingly, affirm the denial of its post-trial motions. Sarauw's appeal, though, is, as Oceanic concedes, clearly meritorious on the basis of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 61 L. Ed.2d 521 (1979), handed down after the entry of judgment in this case by the district court. We shall

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3. The trial judge and the parties refer to this reduction as being for "contributory" negligence, but that term was not used in the interrogatories and it is clear that "comparative" negligence was meant. Sarauw does not challenge this reduction for negligence attributed to his own fault. *Cf.* Rich v. United States Lines, Inc., 596 F.2d 541, 565 & nn.32-33 (3d Cir. 1979) (Garth, J., concurring) (suggesting applicability of comparative negligence doctrine); H. R. Rep. No. 92-1441, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4705 ("[T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employer's own negligence may have contributed to causing the injury.").

therefore vacate the judgment and remand with instructions to restore that portion of the verdict that was decreased because of Hess's negligence.

I. FACTS

Sarauw was employed as a dock helper for Hess, which had the responsibility of unloading the ANDROS ATLAS. The vessel had arrived at Hess's No. 3 dock at St. Croix, U. S. Virgin Islands, to discharge a cargo of crude oil. When the vessel first arrived, a small gangway going from the ship to the dock was put in place by Hess personnel. At about 2:30 a.m. on November 15, 1977, Sarauw observed that the tanker had risen in the water to a point where the small gangway had to be replaced with a longer one. While operating the pier-side crane to swing the longer gangway into position, Sarauw observed that a chain railing was in place on the edge of the vessel's deck where he wanted to secure the head of the longer gangway. After failing to attract the attention of anyone aboard the ship, Sarauw descended from the crane and started up the small gangway which had not yet been removed from the ship's side. When he was part of the way up, the small gangway suddenly came loose from the tanker's side; Sarauw and the gangway fell to the dock, and he was seriously injured.

The small gangway, owned by Hess, has a four inch angle iron welded to its underside. The angle iron fits over a lip at the edge of the ship's deck. This interlocking arrangement was designed to prevent the gangway from rolling away as the vessel rises in the water. Additionally, the head of the gangway is equipped with chains and ropes that are tied to stanchions or padeyes on the deck in order to secure the gangway in the event the angle iron interlock becomes dislodged. It was undisputed that the gangway was not, at the time it fell, fastened to any stanchions or padeyes.

II. OCEANIC'S APPEAL

A. The Denial of its Motion for Judgment Notwithstanding The Verdict.

1. *The Existence of a Duty.*

Oceanic maintains that under the controlling principles of vessel liability to longshoremen under the 1972 Amendments, as enunciated in three recent decisions of this Court, it owed no duty to Sarauw as to the safety of the gangway. *See Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); *Rich v. United States Lines, Inc.*, 596 F.2d 541 (3d Cir. 1979); and *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979).

In *Hurst*, we concluded that because the 1972 Amendments abolished unseaworthiness as a basis of liability, all species of liability without fault were abolished as well, including the doctrine of nondelegable duties. 554 F.2d at 1246-47. This Court recently observed that *Hurst* and *Rich* "firmly establish" that

> "the vessel has no general duty [under §905(b)] continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations (at least when the vessel has no knowledge of the dangerous conditions)."

Griffith, 610 F.2d at 124 (quoting *Rich*, 596 F.2d at 560 (Garth, J., concurring)).

From these principles, Oceanic argues that the line of vessel liability has been drawn on the simple basis of determining who owns the equipment involved in the injury. Oceanic likens the ownership of the gangway in this case to the ownership of the crane causing injury in *Hurst*, which we held to be the exclusive responsibility of the stevedore.

A careful examination of the three principal cases cited by Oceanic reveals that our linedrawing has not been so simplistic. It was not ownership of the crane, but the degree of control over its operation, that was determinative in *Hurst*. *See* 544 F.2d at 1251-52. Retained control was also the critical factual issue in *Rich*. *See* 596 F.2d at 550. As explained in *Griffith*, the evidence in *Rich* "showed *'beyond a doubt'* that the stevedoring company, rather than the vessel, was *'in complete charge* of the details of handling of the containers [on which the injury occurred].' " *Griffith*, 610 F.2d at 124 (quoting, with emphasis added, Rich, 596 F.2d at 557).

In *Hurst*, some cables slipped off a hook at the end of a crane, operating without a safety catch, while the crane was being used to hoist cargo from the ship's hold. The crane from which the hook was appended was land-based and was the means by which the ship was unloaded. Unloading the ship was the primary function of the stevedore, and the crane was an integral part of that operation over which the vessel owner had no control. In contrast, the gangway here was not in the exclusive control of the stevedore. Here, although the stevedore owned the gangway, the vessel owner did not surrender control over the manner in which the gangway was to be secured. Since the ship customarily retains that control, to posit a duty on the basis of it does not amount to reimposition of strict liability and the warranty of seaworthiness.[4]

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4. Prior to the 1972 Amendments, courts had established a vessel's absolute duty of care with regard to the gangway because, as part of the vessel, it was covered in the warranty of seaworthiness. *See e.g.*, Russell v. City Ice & Fuel Co., 539 F.2d 1318, 1320 n.2 (4th Cir. 1976) (citing cases); Reyes v. Marine Enterprises, Inc., 494 F.2d 866, 869 (1st Cir. 1974) (decided before 1972 amendments were applicable). The abolition of the strict liability concept of seaworthiness, however, does not necessarily import the elimination of any duty with respect to the gangway. *Reyes* explicit-

As the trial judge concluded, sufficient evidence was adduced in this case to

> establish a duty on the part of the shipowner and crew to secure and maintain the gangway. Plaintiff's expert, Captain David James, testified that good seamanship requires that the ship officers and crew make certain that the gangway is safely and firmly secured at all times and that a watch be posted in the gangway area as an additional safety precaution. Captain James' testimony as to the duty of the crew of the vessel to secure and maintain the gangway equipment was corroborated by statements to the same effect by the ship's captain and second officer, Captain Thalissimos.

The verdict thus did not rest on an impermissible theory of unseaworthiness or *respondeat superior*, but on a theory of the vessel's negligence in performing a duty separate from any duty owed by the stevedore. The

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ly recognized a claim of negligence against the vessel independent of the warranty of seaworthiness:

> Because the means of ingress or egress, by whomever furnished, are an "appurtenance" of the vessel, the owner has a duty of care regarding them. The owner is thus liable for a negligent failure to inspect a gangway and to warn against defects reasonably apparent from inspection or to take steps to repair or replace it. . . . We hold, therefore, that Romero Reves was entitled to take his case to the jury on the issues of both unseaworthiness and negligence.

494 F.2d at 870. The Court of Appeals for the Ninth Circuit recently noted that "[u]nder the former law, some unsafe conditions which supported an unseaworthiness action might also have supported a negligence action." Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 485 (9th Cir. 1979). The congressional committees therefore took care in their reports to head off the fear that the "abolition of the unseaworthiness action might lead some post-Amendment courts to conclude that if a set of facts would have amounted to unseaworthiness, Congress meant to preclude a recovery based on negligence." *Id.*

statute recognizes that a ship may be held liable when it and the stevedore are concurrently negligent. Indeed, "holding the vessel accountable for its negligence, even though the stevedore has been negligent as well, is necessary to effectuate the congressional design of creating an incentive for the vessel 'to exercise the same care as a landbased person in providing a safe place to work.' " *Rich*, 596 F.2d at 560 (Garth, J., concurring); *see Griffith*, 610 F.2d at 124-25; *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480, 488-89 (9th Cir. 1979). The standard by which Oceanic is to be judged is of "reasonable care under the circumstances," which

> would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Griffith, 610 F.2d at 126.

We conclude that Oceanic had a duty of care with respect to the gangway appurtenant to its vessel, notwithstanding that the gangway was owned by the stevedore. Neither the 1972 Amendments nor our previous decisions in *Hurst*, *Rich*, and *Griffith* are to the contrary.

2. *The Breach of the Duty.*

Oceanic claims that there was insufficient evidence to establish a breach of its duty to maintain the gangway in a safe and secure manner. It argues that the evidence shows that the gangway was secured when it was initially emplaced at about 7:30 p.m., that the gangway was unsecured when it fell with Sarauw aboard at about 2:30

a.m. the following day, and that there was no evidence as to exactly when the gangway became unsecured. Therefore, contends Oceanic, the jury was left to speculate as to the breach because there was no evidence as to when the gangway became untied that would support a finding of Oceanic's actual or constructive knowledge of the dangerous condition of the gangway.

Our scope of review of a jury verdict is, of course, quite limited. "[W]e must view the evidence," and the inferences to be drawn therefrom, "in the light most favorable to the party which obtained the verdict below." *Herman v. Hess Oil V. I. Corp.*, 524 F.2d 767 (3d Cir. 1975). With this limitation in mind, we note that Oceanic's analysis overlooks another ground upon which the jury could have found a breach of the duty to maintain a safe and secure gangway.

Sarauw's expert, Captain James, testified that the officer in charge of the ship was responsible for seeing that the gangway was properly secured and that a gangway watch would be the customary method of fulfilling this responsibility. A gangway watch is a competent, sober, and reliable seaman positioned at the head of the gangway to relay communications to the shore and to check that the gangway is secured at all times. Second Officer Thalissimos of the ANDROS ATLAS confirmed that neither of the two seamen in charge of the night watch were in the immediate vicinity of the gangway at the time of the accident. Since the accident occurred because the gangway was unsecured, it would have been reasonable for the jury to conclude that the gangway watch could have alerted Sarauw of the dangerous condition of the gangway had the watch been properly in place. Moreover, there was no evidence that the gangway lashings broke loose; the evidence is that they simply were not attached at all. Had the gangway watch fulfilled its responsibilities, it should have been aware that the ropes and chains were not tied down. There was therefore ample evidence upon which the jury could rea-

sonably have found a breach of the duty as to the safety of the gangway.

Because Oceanic's duty of reasonable care included responsibility for the safety of the gangway and because there was evidence to support the finding that Oceanic had breached that duty, we conclude that the trial court did not err in denying Oceanic's motion for judgment n.o.v.

B. The Denial of its Motion for a New Trial

1. *The Jury Instructions.*

Oceanic argues that the trial court should have granted a new trial because its instructions on the standard of care based on the Restatement (Second) of Torts §§343 and 343A[5] were erroneous.[6] In *Hurst* we indicat-

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5. These sections read as follows:

§343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

6. The trial judge's instruction paraphrasing §343 was as follows:

ed that those sections were inapplicable to a longshoreman's case insofar as they could be interpreted to create a duty of the shipowner to oversee and be responsible for activities of a stevedore within the latter's exclusive control. *See Hurst*, 554 F.2d at 1249 n.35. Such extensive responsibility, we said, would "saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate." *Id.*; *see Rich*, 596 F.2d at 551.

Shortly after the trial court denied the motion for a new trial, this Court's opinion in *Griffith* was filed. In that case we held that in some respects §§343 and 343A were inapplicable because they were too favorable to the shipowner. We stated that those provisions do not "define for all cases the appropriate standard of care under §905(b)," because they "would apparently relieve a vessel owner of all liability for an unreasonably dangerous condition on board ship if the invitee longshoreman has failed to exercise ordinary care in dealing with that danger, on the theory that a negligent invitee has assumed the risk of injury. . . . [T]hat principle is inconsistent with the clearly stated intention of Congress to abolish the doctrines of contributory negligence and assumption of risk" in these cases. 610 F.2d at 125. Ac-

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A vessel owner is subject to liability for physical harm caused to his invitees caused by a condition on the vessel if, but only if, the vessel owner knows or by exercise of reasonable care would discover the condition and would realize it embodies an unreasonable risk of harm to the invitees and should expect that the invitee will not discover or realize the danger or will fail to protect himself against it, and the vessel owner fails to exercise reasonable care to protect against that danger, to protect that invitee against that danger.

The trial judge's instruction based on §343A was as follows:

A vessel owner is not liable to its invitees for physical harm caused to the invitee by any condition of the vessel whose danger is known or is obvious to the invitee unless the owner should have anticipated the harm despite such knowledge or obviousness of the danger.

cord. Santos v. Scindia Steam Navigation Co., 598 F.2d 480. 486-87 (9th Cir. 1979).

In the circumstances of this case, we conclude that any error in using instructions based on §§343 and 343A would not be a basis for reversal, because it would be error in Oceanic's favor. The standard for vessel liability given in the jury instructions in this case was a more qualified one than that enunciated in *Griffith* of " 'reasonable care under the circumstances.' " 610 F.2d at 125.

2. *The Damage Interrogatories.*

Oceanic argues that it was error to submit to the jury damage interrogatories that allowed the jury to assess as separate components pain and suffering, loss of enjoyment of life, and permanent disability. Separate assessment of disability as a distinct element of damages, Oceanic claims, is duplicative of the other two components, and an award for disability is contrary to the compensatory purpose of damage awards. Because Oceanic not only failed to object at trial to the verdict form, but also specifically agreed to its use, the claim is reviewable by us only if the separate assessment of damages amounts to plain error that "is so fundamental or prejudicial that not to consider it could result in a gross miscarriage of justice." *Thompson v. Burke*, 556 F.2d 231, 236 n.8 (3d Cir. 1977).

All of the elements of the jury's damage award, however, may be found in §§905, 924 of the Restatement (Second) of Torts,[7] which, this Court has noted, is,

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7. These sections read as follows:

§905. Compensatory Damages for Nonpecuniary Harm

Compensatory damages that may be awarded without proof of pecuniary loss include compensation

(a) for bodily harm, and

(b) for emotional distress.

§924. Harm to the Person

when consistent with congressional intent, an appropriate guide in developing a uniform federal law of negligence. *Griffith*, 610 F.2d at 126. We need not decide whether or not separate assessment of the components was error, but only conclude that under the Restatement and *Griffith* any error committed would not be so clear and egregious as to be reviewable.

III. SARAUW'S APPEAL

Sarauw contends that it was error for the trial judge to apply the equitable credit doctrine to reduce the jury verdict by the amount attributed to Hess' negligence.[8] The Supreme Court definitively held in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 61 L.Ed.2d 521 (1979), that the equitable credit doctrine was not an intended part of the statutory scheme. Accordingly, the 25% reduction in Sarauw's verdict must be restored.

IV. CONCLUSION

That portion of the trial court's judgment denying Oceanic's motion for judgment n.o.v. or for a new trial will be affirmed, the portion denying Sarauw's motion will be vacated, and the case remanded with instructions to enter a new judgment restoring the deduction made by the trial judge for Hess's negligence.

One whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective

(a) bodily harm and emotional distress;

(b) loss or impairment of earning capacity;

(c) reasonable medical and other expenses; and

(d) harm to property or business caused by the invasion.

8. The rationale of the equitable credit doctrine and the reason for the Supreme Court's rejection of its application in this type of lawsuit are summarized in *Griffith*, 610 F.2d at 121-22.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

Nos. 79-2076/79-2077

LAWRENCE A. SARAUW,
Appellant in No. 79-2077

vs.
OCEANIC NAVIGATION CORPORATION
and VLCC ANDREAS ATLAS

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS,
Appellants in No. 79-2076

(D. C. Civil No. 78-0057)

ON APPEAL FROM THE DISTRICT COURT OF
THE VIRGIN ISLANDS DIVISION OF
ST. CROIX, CHRISTIANSTED JURISDICTION

Present:
ADAMS, MARIS and SLOVITER,
Circuit Judges

J U D G M E N T

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel on April 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 8, 1979, be, and the same is hereby affirmed with respect to that portion of the said judgment denying Oceanic's motion for judgment n.o.v. or for a new trial, vacated with respect to that portion of the said judgment denying Sarauw's motion, and the cause is remanded with direction that a new judgment be entered restoring the deduction made by the district court for Hess's negligence, all of the above in accordance with the opinion of this Court. Costs taxed in favor of Sarauw.

ATTEST:

May 20, 1980 Clerk

[APPENDIX B]
[App. 17a]

DIVISION OF ST. CROIX

LAWRENCE A. SARAUW,	:	
	:	
Plaintiff	:	
	:	CIVIL NO. 1978/57
vs.	:	
	:	
OCEANIC NAVIGATION CORPORATION and VLCC ANDROS ATLAS,	:	
	:	
	:	
	:	
Defendants	:	

MEMORANDUM OPINION WITH ORDER ATTACHED
(Filed June 8, 1979)

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YOUNG, District Judge

Plaintiff, Lawrence Sarauw, is a longshoreman who was, in 1977, employed by Hess Oil Virgin Islands Corporation

("HOVIC") and he brought this personal injury action in admiralty, under 33 U.S.C. §905(b), against the super tanker, the VLCC "Andros Atlas" (herein, sometimes referred to as the "ship" or the "Andros Atlas") and its Greek owner corporation, the Oceanic Navigation Corporation (herein sometimes, the "ship's owner" or "Oceanic"). Plaintiff seeks compensatory damages of over One Million Dollars for injuries allegedly sustained by him while working for HOVIC as a dock helper at one of HOVIC's docks where the "Andros Atlas" was tied up. Briefly, plaintiff fell onto the dock when the gangway broke loose from the ship's side. At the time of this accident, the ship was discharging crude oil into the intake pipes of the Hess Oil Refinery located in St. Croix.

At the conclusion of the four day trial before a jury, both sides moved for, but were denied, directed verdicts, and the six member jury returned a verdict in plaintiff's favor. Pursuant to the verdict form, the jury found that defendants, Oceanic and "Andros Atlas", were fifty percent at fault for the accident, that plaintiff himself was twenty-five percent contributorily responsible and that HOVIC was twenty-five percent at fault. The jury found that $190,800.00 would be the total amount of damages which would fairly and adequately compensate plaintiff for his injuries, but, pursuant to the Court's instructions, this award was reduced in proportion to the percentage of plaintiff's own contributory negligence and the percentage attributable to HOVIC. Accordingly, judgment was entered on March 27, 1979 in favor of plaintiff,

the amount of $95,400.00 together with costs of $12,995.00 ($12,000 of which are for attorney's fees).

There are now before me several motions, to-wit: (1) Plaintiff has moved for judgment notwithstanding the verdict [In brief, he wants the full award of damages without deduction for any contributory negligence, (2) Plaintiff also moved to amend the judgment under Rule 59(e) [In brief, he objects to the Court's application of the "Murray Credit" wherein plaintiff's award of damages was further reduced by the percentage that his employer, HOVIC, contributed to the accident.], (3) Defendants have moved for judgment notwithstanding the verdict, or (4) in the alternative, for a new trial. Both sides have submitted memoranda in support of their own motions and in opposition to the motions of the other side. For the

reasons stated below, all motions will be denied.

I.

PLAINTIFF'S MOTION FOR J.N.O.V.

Plaintiff argues that there was insufficient evidence to present the question of plaintiff's alleged contributory negligence to the jury. I disagree. The record reflects the following:

Plaintiff testified that while he was working as a dock helper on the later shift in the early morning of November 15, 1977, he became vexed and upset because he was requested to work a second consecutive shift. During this second shift, he became engaged in replacing the small gangway with the larger, more substantial gangway. He decided to make this change

because the rise of the vessel, as its cargo weight was lessened, made the angle of the smaller gangway unsafe and the increased height of the ship's deck from the dock level, mandated the larger gangway. After failing to attract the attention of anyone, whether longshoreman or sailor on board the ship, he determined to attempt this task by himself without help. While operating the crane to place the top of the large gangway on the ship's deck, he noticed a chain blocking the place along the gunwale where the gangway would be placed. He, therefore, descended from the crane and started up the small gangway which had not yet been removed from the ship's side. When he was part way up, the small gangway suddenly came loose from the ship's side and fell down to the dock. It was undisputed that the samll gangway was not, at that

time, securely fastened to any pad eyes or stanchions on the ship's deck. It was also undisputed that plaintiff had previously used this same gangway on two previous occasions in boarding the ship.

With these facts in evidence, I cannot say that there could be but one conclusion that the jury, as reasonable persons, could have reached [1] --to wit, that plaintiff was not free from contributory negligence. Furthermore, his own testimony was that he made the decision to

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1/ The standard to be applied in resolving a j.n.o.v. motion was set forth in Relo v. Insurance Co. of North America, 1975 St. Croix Supp. 404 (D.C.V.I. 1975) as follows: "Whether the evidence is such that without weighing the evidence or passing on the credibility of witnesses or substituting its judgment on the facts for that of the jury, and giving the party against whom the motion is made, the benefit of every legitimate inference that can be drawn from the evidence, whether there can be but one conclusion as to the verdict that reasonable men could reached." 1975 St. Croix Supp. at 407-408.

replace the small gangway with the larger one because the smaller gangway was becoming less secure as the deck of the ship rose above the dock. Clearly there was some evidence of plaintiff's own fault, and I believe that it was enough to go to the jury.

II.

THE "MURRAY CREDIT" DOCTRINE

In a case [2] involving the Federal Employee Compensation Act, 5 U.S.C. §8101, et seq (1970), decided by the Court of Appeals for the District of Columbia Circuit, a fixed fifty percent reduction of recovery was allowed because of the employer's contribution to the fault and causation of the accident. This credit reduction has come to be known as a

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2/ Murray v. United States, 132 U.S. App. D.C. 91, 465 F.2d 1361 (1968).

"Murray Credit." The Murray Credit was subsequently extended to a longshoreman came [3] arising prior to the 1972 amendment of the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §901, et seq.

Judge Leventhal (with his co-panelists, Judge McGowan and now Chief Justice Berger [sic]) explained the Murray Credit as follows:

> A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but the act gave him assurance of compensation even in the absence of fault. Murray v. United States, 132 U.S.App.D.C. 91, 405 F.2d 1361 at 1366 (1968).

Judge Aldisert, in Marant v. Farrell Lines, Inc., 550 F.2d 142 at p. 147

3/ Dawson v. Contractors Transport Corp., 151 U.S.App.D.C. 401, 467 F.2d 729-30 (1972).

(1977), succinctly observed: "...the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence is, at least in this circuit, very much an open question." At the time of Judge Aldisert's observation in 1977, the Murray Credit was rejected by the Ninth Circuit, Dodge v. Mitsui Shintaka Ginko, 528 F.2d 669, 672 (1975) cert. denied, 425 U.S. 944, 96 Sup. Ct. 1685, 48 L.Ed.2d 188 (1976), but had been accepted by the Washington, D. C. Circuit, Dawson, supra.

My research of the appellate decisions since 1977 concerning the Murray Credit has not been as exhaustive as I would have like it to be, but I must concede that I have found no other appellate court decisions accepting or rejecting the Murray Credit (or "Equitable Credit") to LHWCA cases. Hence, I believe that the same is still an open issue, especially in this circuit.

I have decided to apply the Murray Credit because I am completely persuaded that it is fair--fair to the vessel owner and still fair to the longshoreman. The vessel owner is not tapped for the full damage award when it may have been only half at fault (as it was here). On the other hand, even though the longshoreman has had his award reduced proportionately to his employer's degree of fault, this is the price one pays for the positive benefits of a workmen's compensation scheme. In St. Croix, the personal injury lawyers are, shall I say, blessed with two processing industries (oil and alumina [sic]) which, unfortunately, give rise to many industrial accidents and personal injuries cases. Most of these cases go beyond workmen's compensation claims for the underlying reason that the two basic companies customarily contract out maintenance repair and expansion work to independent concerns. Thus, in addition to

claims under workmen's compensation, third party liability actions are routine. Having presided for several years over many of these suits, I have become convinced that the Equitable Credit is indeed equitable. Contrary to Judge Van Dusen's concern or apprehension that an acceptance of the Murray Credit will lead to increased litigation, 4/ I sincerely believe that it will decrease litigation. I believe that it should encourage the parties to settle by removing the large dollar sign from the vision of the injured workman in those cases where the injury was in large part due to the employer's fault.

As I previously mentioned, the jury in this case found that HOVIC was twenty-five percent at fault, plaintiff, twenty-five percent at fault and the ship and

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4/ See Judge Van Dusen's concurring opinion in Marant v. Farrell Lines, Inc., 550 F.2d 142, at p. 148 (1977).

ship owner, fifty percent at fault. Accordingly, I rediced [sic] the total award of $190,800.00 to $95,400.00, giving the vessel a fifty percent credit because of the stevedore's and plaintiff's concurring fault. Plaintiff now asks me to reconsider my application of the "Murray Credit" doctrine, to reject it and then to readjust the award accordingly.

In refusing to reject the Murray Credit, I also note that under §905(b), an injured employee is given a certain right to compensation from his employer, the stevedore, regardless of the employer's fault or of his own contributory negligence. In addition, he has the right to proceed against third parties, in this case, the vessel and vessel owner, for their negligence. In my view, to permit the injured longshoreman to obtain a huge verdict and recover the entire amount from the vessel owner, notwithstanding the stevedore's

concurring negligence, is far more inequitable than it is inequitable to cut down his award to reflect his employer's negligence. 5/ I stand by my decision to reduce plaintiff's recovery according to the proportionate fault findings of the jury.

III.

DEFENDANTS' MOTION FOR J.N.O.V. OR, IN THE ALTERNATIVE, A NEW TRIAL

Oceanic and Andros Atlas also moved for j.n.o.v. pursuant to Rule 50(b), or, in the alternative, for a new trial under

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5/ Cf Dodge v. Mitsui Shintaku Ginko K.K. Toyko [sic], 425 U.S. 944; 528 F2d 669 (9th Cir. 1975), cert. denied (1976); London v. Lief Hoegh & Co., Inc., 521 F.2d 756 (2nd Cir. 1975), reh. denied; 424 U.S. 935 (1976).

Rule 59, 6/ and presented multi-farious [sic] grounds in support of the motions. I will not repeat these grounds here, but will cite them as I discuss each one individually on the merits.

First of all, defendants argue that the overwhelming evidence established that Hess had the sole and exclusive responsibility to secure and maintain the gangway and its equipment and, therefore, under the law, the shipowner owed no such duty.

6/ Among the grounds most commonly raised in a motion for a new trial are the following: (1) the verdict is against the clear weight of the evidence; (2) the damages awarded are excessive; (3) the court erred in admitting or rejecting evidence or in or refusing to give instructions; (4) that there is newly discovered evidence and (5) conduct of the court or counsel tainted the verdict. Rela, supra, at 408. In the instant case, defendants assert grounds (1) and (3). For the most part, analysis will focus on the motion for a new trial since the grounds raised are grounds typically associated with a motion for a new trial and grounds which are insufficient to warrant the granting of a new trial would a fortiori not support a j.n.o.v.

I disagree. The evidence adduced at trial did establish a duty on the part of the shipowner and crew to secure and maintain the gangway. Plaintiff's expert, Captain David James, testified that good seamanship requires that the ship officers and crew make certain that the gangway is safely and firmly secured at all times and that a watch be posted in the gangway area as an additional safety precaution. James' testimony as to the duty of the vessel owner's crew to secure and maintain the gangway equipment was corroborated by statements to the same effect by the ship's captain and second officer, Captain Thalissimos.

This evidence was sufficient to establish a duty on the part of the ship owner, its officers and crew to secure and maintain the gangway. Accordingly, the jury verdict which found that defendants

did have a duty to secure and maintain the gangway and that defendants breached said duty was not against the clear weight of the evidence.

STANDARD OF CARE

The Court adopted §343 of the Restatement of Torts 2nd [7] as the appropriate theory of liability upon which

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7/ §343. Dangerous Conditions known to or Discoverable by Possessor

A possessor of land is subject to liabiltiy [sic] for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect them against it, and

(c) fails to exercise reasonable care to protect them against the danger.

defendants' duty to plaintiff was premised and instructed the jury accordingly. Defendants argue that application of §343 was erroneous under the present state of law in this Circuit.

Under the 1972 amendment to the LAWCA 8/ an injured longshoreman may no longer recover from the vessel for breach of an implied warranty of seaworthiness as he formerly could. However, the longshoreman's action for negligence against the vessel was preserved. Unfortunately, §905(b) did not specify the standard of care to which the vessel may be held and herein lies the problem. As aptly noted

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8/ §905(b) provides in pertinent part:

> In the event of injury to a person covered under the [sic] chapter caused by the negligence of a vessel, then such person ...may bring an action against such vessel as a third party...The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies.

by one Court, "the legal waters surrounding the question of the proper standard (of care) have swirled turgidly with confusion and controversy." Dougherty v. Haaland, 457 F. Supp. 860, 863 (E.D.Pa. 1978).

This Circuit, relying on legislative history to the amended §905(b) 9/ has directed Courts to apply land-based negligence principles in establishing the relevent [sic] standard of care under §905(b).

9/ For example, the House Report stated: The Committee believes that where a longshoreman or other worker covered under this act is injured through the fault of the vessel, the vessel should be liable for damages, just as land based third parties in non-maritime pursuits are liable for damages, when through their fault, a worker is injured. Under this standard...there will be of course disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through application of accepted principles of tort law and the ordinary process of litigation. H.R. Rep.No. 1441, 92nd Cong, 2d Sess. (1972) reprinted in 3 U.S.Code Cong. & Ad. News, pp. 4698, 4702-04 (1972).

Hurst v. Triad Shipping Co., 554 F.2d 1237, 1246-47 (3d Cir.) cert. denied; 434 U.S. 861 (1977). Further, the Courts have looked to the Restatement of Torts 2nd as the national expression of non-maritime tort principles.

The problem remains--which sections of the Restatement of Torts, Second, are appropriate to base a theory of liability. I recognize that recent Third Circuit cases have indicated disfavor with the application of §343 in a longshoreman's §905(b) action against a vessel owner. However, I am of the opinion that none of the relevant precedents of this Circuit specifically rejected §343, but rather, found it inapplicable to the particular factual situation before them. 10/

10/ See Judge Garth's discussion starting on page 41 of the slip opinion in Rich v. United States, supra. See, generally Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), cert. denied, 430 U.S. 969 (1977); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.) cert. denied, 434 U.S. 861 (1977).

Further, I found Judge Garth's argument for application of this section in Rich v. United States Lines, Civil No. 78/1251 (3d Cir. March 6, 1979) very persuasive and adopted his rationale in my decision to instruct the jury under §343. 11/

To briefly restate Judge Garth's analysis in Rich, he began by noting that it is necessary to hold the vessel accountable for its negligence notwithstanding the stevedore's concurring negligence in order to effectuate the congressional intent that the vessel exercise the same care to provide a safe place to work as a land based person must

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11/ It should be noted that several of the Circuits have upheld imposition of vessel liability under Sections 343-343A of the Restatement, Second, See e.g. Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2nd Cir. 1978), cert. denied; 47 U.S. L.W. 3301 (Oct. 31, 1978); Samuels v. Empresa Lineas Martimas Argentinas, 573 F.2d 884 (5th Cir. 1978); Anuszewski Dynamic Mariners Corp., Panama, 540 F.2d 757, 759 (4th Cir. 1976) (per curiam) cert. denied; 429 U.S. 1098 (1977).

do. (Slip Opinion at 34.) He recognized that a Court must not impose liability upon the vessel on the basis of a non-delegable duty doctrine, and that primary responsibility for the safety of the longshoreman with respect to the stevedore's equipment operations must be placed on the stevedore. (Slip Opinion at 35.) In Judge Garth's view, this could be effectuated by drawing a distinction between (1) the condition of the vessel as turned over to the stevedore and as affected by subsequent activities of the vessel's crew and (2) the activities of the stevedore and its employees or the condition or type of gear utilized by the stevedore. Judge Garth concluded:

> "With respect to the condition of the vessel, I believe Congress intended the vessel to be held to the same duty a landowner owes to business invitees... and §343 specifies the duty owed to the possessor of land to his invitee with respect

to dangerous conditions known or discoverable by the possessor." Slip Opinion at 36.

With regard to this case, the evidence has convinced me that a ship's gangway is the "front door" of the ship. In fact, it may well be the only door. When a ship is swinging on its anchor or tied up to a dock, the gangway is the only means of access short of climbing up the anchor chain or "hand-over-handing" it on her mooring lines. Thus, once a gangway is put into place, whether the gangway is owned by the ship or by the stevedore, it becomes an integral part of the ship. Good seamanship requires that the gangway be secured. It should be just as firm and secure as the life rail stanchions which border the deck to prevent persons from falling off. It should be just as firm and secure as any other ladder or companionway on board the ship. I cannot imagine that any ship's officer would

ever say that "once we tie up to a dock, the stevedore has sole control and responsibility for the gangway." True, the stevedore may have the duty to furnish a gangway, or to place it, but the ship's crew, as brought out in the evidence in this case, has the responsibility to see that the ship and gangway are "secured together as one" so that anyone can board or leave the ship safely.

Section 343 of the Restatement (Second) of Tort specifies the duty owed by a possessor of land, which is analogous to the vessel owner, to his invitees--a classification under which the longshoreman clearly falls, with respect to dangerous conditions known to or discoverable by the possessor (vessel owner). I feel that the application of this provision accords with the Congressional intent of "encouraging safety because the vessel will still be required to exercise the same

care as a land based person in providing a safe place to work." Rich, supra at 38. Further, as noted by Judge Garth in Rich, impunity from this provision would, "in contravention of congressional design, place the vessel in a preferred position to the land based person." (Slip opinion at 38.)

Finally, defendants argue that its requested instructions, which I denied, should have been applied as the law in this case. I need spend little time addressing myself to this contention. Briefly, all of the requested by denied instructions set forth theories as to the scope of the vessel owner and stevedore's duty. As I stated in an earlier portion of this Opinion, the question of the proper standard of care is unclear under the present law and I choose to adopt §343 as the most appropriate theory of liability under the facts in this case.

Further, it should be noted that some of the requested but denied instructions were merely longer versions of the requested but denied instructions were merely longer versions of the principle that "the primary responsibility for the longshoreman's safety was on the stevedore" --as the jury was explicitly instructed in the instant case. Since I so instructed the jury that the primary responsibility for the longshoreman's safety was that of the stevedore, it is fair to assume that the jury, from all of the evidence before it, felt that the ship's crew still had some responsibility and that it either disregarded or neglected that responsibility, which accounted for

at least one half of the blame for the accident.

DATED: June 8, 1979.

WARREN H. YOUNG, JUDGE

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

DIVISION OF ST. CROIX

LAWRENCE A. SARAUW,	:	CIVIL NO. 1978/57
Plaintiff	:	
vs.	:	
OCEANIC NAVIGATION CORPORATION and VLCC ANDROS ATLAS, Defendants	:	

O R D E R

In accordance with the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby

ORDERED that plaintiff's, Lawrence Sarauw's, motion for judgment notwithstanding the verdict and to amend the judgment be denied. It is hereby further

ORDERED that defendants', Oceanic Navigation Corporation and VLCC Andros

Atlas', motion for judgment notwithstanding the verdict, or, in the alternative, a new trial be DENIED.

DATED: June 8, 1979.

ENTER:

WARREN H. YOUNG, JUDGE

ATTEST:

EDGAR D. ROSS, CLERK

By: _____
DEPUTY CLERK